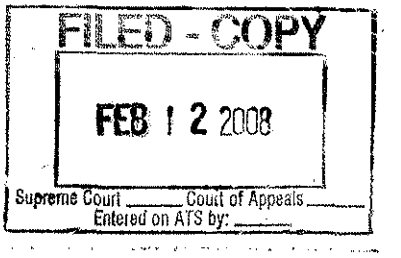
2-12-2008

State v. Lampien Appellant's Brief Dckt. 36115

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. MELANIE LAMPIEN, Defendant, Appellant.	)	No. 34145



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE PETER D. MCDERMOTT
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IDAHO:

STATUTES

IDAHO CONSTITUTION

RULES

STATEMENT OF THE CASE

Nature of the Case

This is as appeal from the District Court's Judgment of Conviction dated March 19, 2007, entered upon the defendant's guilty plea and sentencing on the charge of Harboring a Wanted Felon, Felony in violation of I.C. section 18-205. The court therein sentenced the appellant to a unified term of five (5) years with three (3) years fixed and a two (2) year indeterminate period to follow. This was the maximum penalty provided by law, and was imposed contrary to the State's recommendation of probation as well as that of the Pre-Sentence Investigator.

The Appellant filed a timely notice of appeal and subsequent thereto filed a timely Motion to Reconsider her sentence pursuant to Rule 35 of the Idaho Criminal Rules. On July 17, 2007, following a hearing and oral arguments the District Court entered its Order Denying the Motion to Reconsider. Thereafter, a timely Amended Notice of Appeal was filed by Appellant.

Appellant asks this court to review the sentence imposed and consider whether it was excessive given the recommendations of the State and the Pre-Sentence Investigator at the time of sentencing for placement on probation. Appellant also raises for the first time on this appeal a jurisdictional and due process issue regarding the validity of the Prosecuting Attorney's Information charging her with Harboring a Felon. Finally, the scope and application of the Victims Rights Amendment and I.C. section 19-5306 is questioned by the Appeal.

Statement of Facts and Course of Proceedings

Melanie Lampien suffers from Bipolar Disorder as well as Post Traumatic Stress Disorder resulting from this incident. She was under the care of Dr. Thana Singarajaah M.D. at the time of her sentencing. The appellant, Melanie Lampien was 33 years of age at the time of her arrest. She had no prior record, and had three minor children from previous relationships. Although she shares custody of all her children none are living with her at this time due to her incarceration. Ms. Lampien married Nicholas McKenna on April 5, 2006. McKenna was on felony probation at the time of their marriage.

Appellant had been aware for some time that McKenna's probation officers were looking for him. In approximately June, 2006 they had advised Melanie that they wanted to talk to McKenna about some burglaries and that he hadn't been checking in as required. She had been told that there were warrants for McKenna, but she had not been shown any, and didn't know what kind of warrants they were. In the reports attached to the Pre-Sentence Report it appears they were attempting to serve Probation Violation warrants.

On at least two (2) occasions, between June 2006 and August 31, 2006, Melanie tried to convince McKenna to turn himself in to his probation officer. On one such occasion, she assisted by trying to drive McKenna to their office. However, McKenna jumped from her moving car and injured himself in a half-hearted suicide attempt. She aborted the effort at that point. On a second occasion during a discussion to turn himself in, McKenna obtained a pistol and fired a shot into his own leg causing a flesh wound. This was also done to garner sympathy and to dissuade Melanie's efforts for him to surrender himself.

On August 31, 2006, law enforcement and probation parole came to Melanie Lampien's residence of 870 Buchanan, Apartment D, Pocatello, Idaho, looking for McKenna. They were there regarding out-standing probation violation warrants. Melanie Lampien did initially lie and tell law enforcement and probation and parole officers that McKenna was not inside the residence. She acknowledges that this was false information as McKenna was in the residence at the time but as on previous occasions had begged for her to not disclose his whereabouts as he did not want to turn himself in to the authorities. Melanie was caught in a very difficult situation.

It is clear from the record that the probation offices and police did not believe Melanie, in fact were convinced he was in fact inside. Law enforcement along with the probation officers waited outside the residence for approximately an hour observing the comings and goings and making a decision whether to go back inside to look for McKenna. They ultimately determined that they would enter the residence. At that point, two probation officers and two law enforcement officers again knocked on the door of Melanie Lampien's residence. When she answered the door Melanie was told to step aside, and they entered the apartment basically without her permission.

Upon entering the residence and searching, Officer Peterson of the probation department was confronted by McKenna who was brandishing a pistol. Officer Peterson was able to get a hold of McKenna and the firearm. A struggle ensued involving McKenna as well as the other officers who had entered the residence. Various shots were fired during this altercation. One shot may have come from the weapon possessed by McKenna and two shots were fired by Officer Busch of the Pocatello Police Department into the legs of McKenna in effort to subdue him. Finally, a third round was fired,

allegedly by Officer Busch striking McKenna in the head and killing him. Officer Mathew Shutes also, fired two (2) shots, but it is unknown where those bullets traveled. (Detailed Incident Report Officer Marchand attached to Pre-Sentence Report.)

Officers Shutes of the Pocatello Police Department received a gun-shot wound to his left foot during the alteration. Officer Dayley of Probation and Parole received a gun-shot wound to his left leg. Officer Peterson of Probation and Parole received an injury to his left hand and also appeared to have had a bullet strike the rear panel of his ballistic vest.

Appellant, Melanie Lampien at no time participated in any of the events once the officers were inside of her apartment. There was no allegation that she interfered with officers in any way or attempted to intervene during the struggle. Melanie Lampien did not know that McKenna still possessed the fire-arm which he brandished at the time of the incident. She acknowledged that she was aware that he had previously possessed this weapon, because as indicated he had at one point wounded himself with the gun in an effort to avoid surrendering himself. However following that event, McKenna had promised he had gotten rid of the gun and no longer had it in his possession or in her house. She had no knowledge that the officers may be subject to that type of threat when they entered into her apartment. (R. pg. 30-32)

The appellant Melanie Lampien was charged with the crime of Harboring a Felon, Felony in violation of Idaho Code Section 18-205. She had no prior criminal history. Melanie Lampien's personal background, Mental Health disorders and struggles with McKenna's manipulative behavior were all acknowledged by the State. (R. pg. 44-49) A plea agreement was reached under which she agreed to enter a plea of guilty as charged.

The State therein agreed at the time of sentencing to recommend probation and further agreed not to oppose a withheld judgment. This was a nonbinding plea agreement pursuant to Rule 11 (d)(1)(c) I.C.R. (R. pg. 48) A Pre-sentencing Report was ordered by the Court as required prior to sentencing. The recommendation of that Pre-sentencing report was for the Court to suspend any period of incarceration and place the Defendant on probation under the Court's usual terms and conditions. It further recommended as a sentencing option that the Court consider a period of local incarceration. (See Pre-Sentence Report pg. 10)

This was obviously a highly publicized case and emotionally charged due to the death of McKenna and the injuries received by law enforcement officers. Appellant agreed to resolve the case without going to trial, in light of the State's willingness to make a lenient sentencing recommendation. Due to that decision, some important issues and potential defenses were not addressed, including the validity of the charging language contained in the Prosecuting Attorney's information.

Melanie Lampien appeared for sentencing on March 19, 2007. The Court allowed Probation Officers, Wally Peterson, Jed Dayley, and Police Officer Mathew Shutes to present statements pursuant to the terms of Idaho Victim's Rights Amendment as well as the Statutory Provisions of Idaho Code, Section 19-5306. (Tr. pg. 51-56) This was done over the objection of trial counsel arguing that they were not victims of the crime for which appellant was charged. (Tr. pg. 50) They were victims of the crime committed by McKenna during his altercation with them at her residence. Having considered the information contained in the Pre-Sentence Report as well as the arguments of counsel and the Victim Statements of the above referenced officers, the District Court rejected in total

the sentencing recommendations of the State, the Pre-Sentence Investigator as well as counsel for the Appellant. The Court sentenced Melanie Lampien to the maximum term allowed by law of five (5) years in prison, with a minimum term of incarceration of three (3) years followed by an indeterminate period of two (2) years. This appeal followed.

Issues

I. The charge of Harboring a Felon, as set forth in Prosecuting Attorney's information is defective, and the Defendant's guilty-plea should be set aside.

   a. I.C. section 18-205 is clear and unambiguous and should be applied without resort to legislative history or rules of statutory interpretation.

   b. If this court finds I.C. section 18-205 ambiguous as applied, then the Rule of Lenity should be invoked.

   c. Rule 12 Idaho Criminal Rules should be interpreted by the Court to allow Appellant to attack the sufficiency of the Prosecuting Attorneys Information for the first time on this appeal.

II. The sentence imposed by the District Court was excessive and an abuse of Discretion given all the facts and circumstances.

III. It was an abuse of discretion, and created a manifest of injustice pursuant to Idaho Code Section 19-5306 for the Court to allow Victim Statements from the injured officers whose recommendations were contrary to those presented by the State.

   a. The Appellant did not commit, nor did she attempt to commit any violent crime against those individuals nor was she accused of being an accomplice to the violent crime committed by McKenna prior to his death.

   b. The Appellant was deprived of the benefit of the State's recommendation for probation by allowing agents of the State to make recommendations to the contrary

Argument

Issue I.

The charge of Harboring a Felon, as set forth in Prosecuting Attorney's information is defective, and the Defendant's guilty-plea should be set aside.

Appellant was charged by Prosecuting Attorney's Information with the crime of Harboring a Felon, a felony in violation of Idaho Code, Section 18-205. (R. pg. 21) The charging language of that document states therein:

> "that Melanie Ann Lampien, in the County of Bannock, State of Idaho, on or about the 31st day of August, 2006, did with knowledge that Nicholas Verl McKenna was charged with a felony probation violation, and that law enforcement officers were attempting to locate Nicholas Verl McKenna, did conceal, harbor and protect Nicholas Verl McKenna, by that the Defendant, when asked by law enforcement officers of the whereabouts of Nicholas Verl McKenna, denied knowledge of Nicholas Verl McKenna's whereabouts, while having actual knowledge that Nicholas Verl McKenna was at that time concealed in the Defendant's residence located at 870 N. Butte Cannon Street, Pocatello, Idaho." (emphasis added)

It appears clear from the record, including the Affidavit of Probable Cause in Support of the Criminal Complaint (R. pg. 12) as well as the charging language in the Prosecuting Attorney's Information that the warrant officers were attempting to serve on Nicholas McKenna at the time of the incident was a warrant for his arrest alleging a probation violation. They were not trying to arrest him for any new felony charge, nor was he being sought as an escapee from any charge for which he had been previously convicted. Mr. McKenna was admittedly on probation for two prior felony convictions and he had apparently allegedly violated the terms of that probation in some respect. The Affidavit of Probable Cause in Support of the Criminal Complaint states:

> "At approximately 8:10 p.m., Bannock County dispatch faxed me copies of two confirmed original arrest warrants for Nicholas Verl McKenna, that

included Case Number CR-02-70750-FE and Case Number CR-03-6985-FE. (R. pg. 13)."

These would be warrants arising out of Nicholas Verl McKenna's previous convictions and cases in which he was serving a term of probation. (See also detailed incident report officer Merchand attached to Pre-Sentence Report) It is unclear what the underlying nature of those charges were as they were never provided in discovery and are not part of this record. However, there is reference in the Pre-Sentence Report to the fact that Nicholas Verl McKenna was on probation for the charge of Rape and Burglary (Pre-Sentence Report, pg. 6). (See also, R. pg. 33)

The elements of the offense for which Appellant was charged are found in Idaho Code, Section 18-205. It provides therein:

> "ACCESSORIES DEFINED. All persons are accessories who, having knowledge that a felony has been committed:
>
> 1. Willfully withhold or conceal it from a peace officer, a judge, a magistrate, a grand jury or trial jury; or
> 2. Harbor and protect a person who committed such felony or who has been charged with or convicted thereof."

This provision of Idaho law defines what would more commonly be described as an Accessory after the Fact. Idaho Code, Section 18-204 defines principles to a crime and Idaho Code, Section 19-1430 eliminated any legal distinction between an accessory before the fact and a principal to the crime itself. Therefore it is quite clear from the reading of those statutes that Idaho Code, Section 18-205 relates to and refers only to conduct that would have occurred by the Appellant after the commission of a crime by a third party.

This is an extremely important distinction to make, as it is clear from the record before the Court on this appeal that no new crimes were alleged to have been committed

by Nicholas Verl McKenna. There were only warrants alleging a violation of the terms and conditions of his probation from previous offenses that he apparently was convicted of in 2002 and in 2003.

Idaho Code, Section 18-205 does not prohibit the conduct alleged in the Prosecuting Attorney's Information. Specifically, it makes no reference to warrants of arrest for probationers who are alleged to have violated terms and conditions of probation.

a. I.C. SECTION 18-205 IS CLEAR AND UNAMBIGUOUS AND SHOULD BE APPLIED WITHOUT RESORT TO LEGISLATIVE HISTORYOR RULES OF STATUTORY INTERPRETATON.

The standards applicable to the construction and interpretation of criminal statutes are well established:

> "Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. The language of the statute is to be given its plain, obvious, and rational meaning. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation.
> State v. Beard, 135 Idaho 641, 646, 22 P.3d 116, 121 (2001) (citations and internal quotations omitted).

Thus, a court facing a question of interpretation of a criminal statute must first determine if the statute is plain and unambiguous. It is well recognized that "where both a general statute and a special or specific statute deal with the same subject matter, the provisions of the special or specific statute will control those of the general statute." Driver v. S.I. Corp., 139 Idaho 423, 80 P.3d 1024, 1030 (2003) (citation omitted)."

The relevant statutes to this analysis are Idaho Code §§ 18-203, 18-204, 18-205, 19-1430 and 18-705. Idaho Code § 18-203 provides:

"CLASSIFICATION OF PARTIES. The parties to crimes are classified as:

1. Principals; and
2. Accessories."

Idaho Code § 18-204 sets forth the definition of principals to a crime and includes those who are accessories before or during the commission of a crime:

> "PRINCIPLES DEFINED. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, or who, by fraud, contrivance, or force, occasion the intoxication of another for the purposes of causing him to commit any crime, or who, by threats, menaces, command or coercion, compel another to commit any crime, are principals in any crime so committed."

Additionally, Idaho Code § 19-1430 further clarifies that all persons involved during the commission of a crime are principles:

> "DISTINCITON BETWEEN ACCESSORIES AND PRINCIPALS ABOLISHED. The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though, not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal."

These provisions of law give guidance to the application of Idaho Code, Section 18-205 set forth hereinabove. The conduct which is prohibited by Idaho Code, Section 18-205 clearly requires as a prerequisite or condition precedent that some other third party has committed a felony offense. The Court in State v. Teasley, 130 Idaho 113, 58 P.3d 97 (Ct. App. 2002) in interpreting this statute stated:

> "The statute defines two types of accessories. The first type of accessory is one who willfully withholds or conceals a felony from law enforcement. The second type of accessory is one who harbors or protects a person

charged with, or convicted of a felony. In both types of accessories, the person must have "knowledge that a felony has been committed."

"The text of the statute plainly requires that an accessory have knowledge on some level that a felony has been committed..... Although the legislative history of the statute does not address its purpose, presumably the legislature passed the statute to aid law enforcement in the apprehension of felons." Teasley at 116.

The charging language in the Prosecuting Attorney's Information in this case does not meet even the basic statutory requirements set forth by the clear language of the statute itself and the Court's interpretation of that statute. That document does not allege in its terms that Nicholas McKenna committed any new felony offense, but only that he was alleged to have violated the terms and conditions of his probation.

If there is any ambiguity in the terms of Idaho Code, Section 18-205 it is in the final three words of subparagraph 2 which states "or convicted thereof". However, that provision put in context should only apply to individuals who have been charged, convicted and who have failed to appear for further proceedings or have escaped from a penal institution or otherwise. If the legislature had intended for this statute to include individuals previously convicted of a crime and currently serving terms and conditions of probation, then that would have been specifically set forth within the statute.

b. IF THIS COURT FINDS I.C.SECTION 18-205 AMBIGUIOUS AS APPLIED, THEN THE RULE OF LENITY SHOULD BE INVOKED.

The United States Supreme Court spoke to the cannons for interpreting an ambiguous statute in *State v. Crandon,* 494 U.S. 152 (1990). The Court stated:

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and its object and policy. Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of

> the boundaries of criminal conduct and the legislatures, not courts, define criminal liability." *Id.* at 1001-1002.

The *Crandon* Court noted the importance of not deciding a case based upon interpreting a statute using the "possible" legislative intent or policies the legislature might have had in mind at the time it authored the statute. The Court in *Teasley at 116*, supra noted that the legislative history of the statute does not address its purpose. If it is intended to assist in apprehending felons, as suggested, then it clearly applies to new felony crimes on which they are attempting to avoid detection and arrest. Criminal statutes are promulgated on the premise that they give notice to society regarding the bounds of the law. The general public cannot be on notice of what might have been the legislature's intent or policy behind drafting a statute.

Justices Scalia, Kennedy, and Thomas further spoke to this premise in a concurring opinion in *United States v. R.I.C.*, 503 U.S. 291 (1992). They concluded:

> "that it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history. Once it is determined that the statutory text is ambiguous, the rule requires that the more lenient interpretation prevail." *Id.* at 293 (Scalia concurring)."

The Justice's further stated that the consideration of legislative history:

> "compromises the purposes of the lenity rule: to assure that the criminal statutes provide a fair warning of what conduct is considered illegal." *Id.*

In the interest of justice, absent a clear statement from the Idaho Legislature, this Court should refrain from ascertaining the possible intent of the legislature or the policies it might have had in mind in enacting the statute.

"It is well-settled that criminal statutes are to be construed strictly and *in favor of the defendant.*" *State v. McCoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996) .

"[A]mbiguity concerning the *ambit of criminal statutes* should be resolved in favor of lenity." *United States v. LeCoe*, 936 F.2d 398, 402 (9th Cir. 1991) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Ambit is defined as "the scope, extent or bounds of something." THE OXFORD ENGLISH REFERENCE DICTIONARY, p.41 (2d. ed. 1996). Thus, "ambiguity concerning {the scope} of criminal statues should be resolved in favor lenity." See *Lecoe* 936 F.2d at 402.

The appellant, Melanie Lampien is no doubt guilty of violating the provisions of I.C. section 18-705 for Obstructing an Officer by providing False Information, a misdemeanor. It provides:

> "RESISTING AND OBSTRUCTING OFFICERS. Every person who willfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year."

This statute clearly puts her on notice that her conduct was unlawful and subject to the misdemeanor penalties provided. In applying the rules of statutory construction and if necessary the Rule of Lenity this court should find that the Prosecuting Attorney's Information charging the Appellant with the crime of Harboring a Felon is fatally defective and her guilty plea thereto vacated.

c. RULE 12 IDAHO CRIMINAL RULES SHOULD BE INTERPRETED BY THE COURT TO ALLOW APPELLANT TO ATTACK THE SUFFICIENCY OF THE PROSECUTING ATTORNEYS INFORMATION FOR THE FIRST TIME ON THIS APPEAL.

Rule 12 of the Idaho Criminal Rules provides in pertinent part as follows:

> "RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL
>
> (b) PRETRIAL MOTIONS. Any Defense objection or request which is capable of determination without trial of the general issue may be raised before the trial by motion. The filing must be raised prior to the trial:

(2) Defenses and objections based on defects in the complaint, indictment or information (other than it fails to show jurisdiction of the court or to charge an office which objection shall be noticed by the court at any time during the pendency of the proceedings).

Clearly, pretrial motions of this nature should, in most circumstances, be brought prior to trial, however, there are circumstances such as presented by this case where it was not practical, and at that time did not appear necessary to attack the validity of the charge. There is always the concern that if the Appellant contested the State's case in any respect, that they would no longer be willing to show leniency and maintain their recommendation of probation. Further, it could have simply been an oversight by counsel, in light of the proposed plea resolution and sentencing recommendations. It likely seemed the easiest way out of what had to be a very emotional situation and highly publicized case. This Court has commented on this issue on more than one occasion. In *State v. Cahoon, 116 Idaho 399, 775 P.2d. 1241(1989)*, this Court addressed the issue of the timeliness of a motion attacking the validity of a charge. After quoting Rule 12 of the Idaho Criminal Rules, the Court stated:

> "This provision would appear to allow counsel to keep silent about a document's failure "to charge an offense" until after trial. However, Federal Rule of Criminal Procedure12(b)(2) is essentially identical to Idaho's rule and the federal courts have consistently held that an indictment not challenged before trial would be upheld unless it is so defective that it does not, by any fair or reasonable construction, charge an offense for which the defendant is convicted.
>
> The reasons for this rule were discussed in *United Stated v. Pheaster*, 544 F2d. 353, 360, 361 (9th Cir. 1976), *cert denied*, 429 U.S. 1099, 97 S.Ct. 118, 51 L.ed.2d. 546 (1977):
>
> A challenge to the sufficiency of an indictment is not a game in which the lawyer with the sharpest eye or the cleverest argument can gain reversal for his client. "'Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused.'"...
>
> Failure of an indictment to state an offense is, of course, a fundamental defect which can be raise at any time. [Citations omitted.] However, the

> very limited resources of our judicial system require that such challenges be made at the earliest possible moment in order to avoid needless waste. Consequently, although such defects are never waived, indictments which are tardily challenged are liberally construed in favor of validity. For example, this Court held that when an indictment is not challenged be for the verdict, it is to be upheld on appeal if the necessary facts appear in any form or by fair construction can be found within the terms of the indictment.;" [Citations omitted.] In our view, the same standard should apply here, where the challenge came in a motion for acquittal after all evidence had been received. Such a long delay in raising the issue suggest a purely tactical motivation of incorporating a convenient ground of appeal in the event the jury verdict went against the defendants. Furthermore, the fact of the delay tends to negate the possibility of prejudice in the preparation of the defense."

Again, in *State v. Quintero, 141 Idaho 619, 115 P.3d. 710 (2005)*, the Court addressed the Defendant's ability to attack the validity of a charging document pursuant to Rule 12 of the Idaho Criminal Rules. The Court stated:

> "Since the indictment of information provides subject matter jurisdiction to the court, the court's jurisdictional power depends on the charging document being legally sufficient to survive the challenge."
>
> "As to the district court's conclusion that it lacked jurisdiction, "[t]he indictment or information filed by the prosecution is the jurisdictional instrument upon which a defendant stands trial." *Jones*, 140 Idaho at 757, 101 P3d. at 701 (citing *State v. Izzard*, 136 Idaho 124, 127, 29 P.3d 960, 963, (Ct. App. 2001)). "Subject matter jurisdiction in a criminal case is conferred by the filing of an 'information, indictment, or complaint alleging an offense was committed within the State of Idaho.'" *Jones*, 140 Idaho at 757-58, 101 P.3d at 701-02 (quoting *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2204)). "Since the indictment or information provides subject matter jurisdiction to the court, the court's jurisdictional power depends on the charging document being legally sufficient to survive the challenge." Id. At 758, 101 P3d at 702. To be legally sufficient, an indictment or information must meet two standards:
>
> First, there is the question of whether an indictment or information is legally sufficient for the purpose of due process during proceedings in the trial court. Second, there is the separate question of whether an indictment or information is legally sufficient for the purpose of imparting jurisdiction."

The charging language in the Prosecuting Attorney's Information is so fatally defective that does not by any fair or reasonable construction, charge an offense contemplated by I.C. section 18-205. It therefore goes to the very jurisdiction of the Court and Appellant should be allowed to raise the issue for the first time on this appeal.

Issue II.

The sentence imposed by the District Court was excessive and an abuse of Discretion given all the facts and circumstances.

The standard review is for this Court to determine whether or not the District Court abused its discretion in the sentence imposed. *State v. Toohill*, 103 Idaho 568, 650 P.2d 707 (Ct. App. 1982); *State v. Sanchez*. 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989). As the court stated in *State v. McDougall*, 113 Idaho 900, 749 P. 2d 1025 (Ct. App. 1988):

> "A sentence may represent a clear abuse of discretion if it is unreasonable upon the facts of the case. State v. Nice, 103 Idaho 89, 645 P.2d. 323 (1982). Our standard of reasonableness as set forth in Toohill is well-known and need not be repeated here. It suffices to say that ordinarily we juxtapose the nature of the offense and the character of the offender, State v. Reinke, 103 Idaho 771, 653 P.2d. 11 (Ct. App. 1982), with the goals of protecting society, deterring criminal activity, rehabilitation of the defendant, and punishment for retribution." See State v. Toohill, supra. McDougall at 905."

The Court in *Toohill* went on to define a "reasonable sentencing" as:

> "We hold that a term of confinement is reasonable to the extent that it appears necessary, at the time of the sentencing, to accomplish a primary objective protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, Id at 568."

Idaho Code Section 19-2521, states that the court shall deal with the person who has been convicted of a crime without imposing a sentence of imprisonment unless,

having regard to the nature and circumstances of the crime and the history, character and condition of the Defendant, it is of the opinion that imprisonment is necessary for protection of the public under certain criteria specified in the statute. The statute also sets forth the factors for the Court to consider which weigh against a sentence of incarceration.

It is apparent from the District Court's sentencing colloquy, that the Court felt the maximum penalty provide by law was appropriate in this case pursuant to Idaho Code Section 19-2521(1)(c)(d)(e). These subsections generally address deterrence to the defendant and others as well as depreciating the seriousness of the crime. It does not appear that there would be any support for the argument that the sentence was justified due to a fear that the appellant may commit another crime if placed on probation or that she was in need of correctional treatment that can be provided most effectively in an institution. (19-2521(1)(a)(b).) Finally, the appellant was not a multiple offender or professional criminal to justify such maximum penalty to be imposed. (19-2521(1)(f).)

Those provisions which would weigh in favor of avoiding a sentence of imprisonment are as follows:

> **19-2521(2)(b)**. "The defendant did not contemplate that her criminal conduct would cause or threaten harm."

It is very clear that through out the investigative reports attached to the Pre-Sentence Report as well as the appellant's comments at the time of sentencing, that she was not aware McKenna still possessed a firearm. They had previously argued over that issue when McKenna wounded himself to avoid Melanie's efforts to require him to voluntarily surrender himself. Following those arguments she had been promised that he had gotten rid of the firearm, and she had not seen it since that time. The Prosecuting

Attorney and Pre-sentence Investigator seemed to accept that explanation, however, the sentencing Court was not willing to accept that as an excuse for her conduct and the ultimate injuries suffered by the police officers and probation officers.

19-2521(2)(c). "The defendant acted under strong provocation."

Melanie had on previous occasions made efforts to require McKenna to voluntarily surrender himself. He had threatened suicide and actually attempted suicide by jumping out of her vehicle and also by wounding himself in the leg with a firearm. She was a victim of domestic violence and emotional abuse herself as a result of McKenna's actions. Again, the Prosecuting Attorney and Pre-sentencing Investigator seemed to accept and be sympathetic toward her situation and her efforts in attempting to deal with Mr. McKenna.

> **19-2521(2)(g).** "The defendant has no history of prior delinquency or criminal activity or has lead a law abiding life for a substantial period of time before the commission of the present crime."

Obviously, it appears in the Pre-Sentence Report that the defendant had no history of criminal activity. She has three (3) children from prior relationships and has led a law abiding lifestyle her entire life.

> **19-2521(2)(h).** "The defendant's criminal conduct was the result of circumstances unlikely to recur."

Based upon the defendant's lack of prior record and the circumstances leading up to this event, it is extremely unlikely that these types of events will ever reoccur. Again, it appeared that the District Court's sentence was based entirely upon the premise of deterrence to others not to engage in this type of conduct. Although that is one of the sentencing criteria, it does not seem to justify the imposition of the maximum penalty or

even a three (3) year minimum which is the guiding point for this Court's determination of the excessiveness of the sentence.

> **19-2521(2)(i).** "The character and attitudes of the defendant indicate that the commission of another crime is unlikely."

Again, based upon the appellant's lack of any prior record and law abiding lifestyle, it would not appear that a commission of another crime is likely. The Court did not even comment on this possibility as one of the sentencing factors. Therefore a sentence of incarceration was not necessary for the protection of society, considering that factor.

The Prosecuting Attorney in addressing the Court of the time of the sentencing, hit on all of the above referenced provisions weighing against a sentence of imprisonment. He felt that appellant acted under a strong provocation due to McKenna's self-destructive behaviors and his threats of suicide. The Prosecuting Attorney seemed to accept the explanation that Melanie did not believe McKenna possessed a firearm. Therefore, she did not contemplate that her conduct would result in the harm that occurred. She had no history of prior criminal behavior and therefore the likelihood for further crimes was unlikely, and the circumstances leading to these events was unlikely to reoccur (Tr. Pg. 44-49).

The Pre-Sentence Investigator appeared to touch on all these same issues in her final comments to the Court (Pre-Sentence Report pg. 9 -10). It also pointed out the defendant suffered from mental health issues and was currently under treatment, which also mitigated against a sentence of imprisonment. The Pre-Sentence Investigator, due to the seriousness of the events and the injuries suffered by the law enforcement officers, along with the death of McKenna, stated a period of local incarceration as a punitive

measure may be appropriate. The sentencing criteria of protection of society by deterring others from like conduct certainly could have been satisfied by a period of local incarceration.

The Court, in sentencing appellant, seemed to totally reject and disregard Appellant's claims that she was not aware that McKenna still possessed a firearm, and further appeared to totally reject any assertion that she could not have intervened and stopped these events from occurring. The officers, in effect, barged into her house without asking her permission. She had no legal or physical way of stopping their entrance into her home, and should not be held responsible for McKenna's actions in brandishing a firearm and attacking the officers (R. pg. 30-33).

Appellant will have been incarcerated for over one (1) year by the time this matter is considered by the Court on appeal. Appellant asks that this Court to grant relief by suspending the balance of her sentence, and allow her to complete a period of probation as recommended by the Prosecuting Attorney and Pre-sentencing Investigator at the time of the original sentencing.

Issue III.

It was an abuse of discretion, and created a manifest of injustice pursuant to Idaho Code Section 19-5306 for the Court to allow Victim Statements from the injured officers whose recommendations were contrary to those presented by the State.

a. **The Appellant did not commit, nor did she attempt to commit any violent crime against those individuals nor was she accused of being an accomplice to the violent crime committed by McKenna prior to his death.**

b. **The Appellant was deprived of the benefit of the State's recommendation for probation by allowing agents of the State to make recommendations to the contrary.**

When appellant appeared at the time of her sentencing, the Court was advised by the Prosecuting Attorney that three of the officers involved in and wounded during the altercation with McKenna were present and wished to make victim's statements pursuant to Idaho Code Section 19-5306 and the provisions of Article 1, Section 22 of the Idaho Constitution. Idaho Code Section 19-5306(1)(e) states as follows:

> **19-5306. Rights of victim during investigation, Prosecution, and disposition of the crime. (1)** Each victim of a criminal or juvenile offense shall be: (emphasis added)
>
> **(e)** Heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration, placing on probation or release of the defendant unless manifest injustice would result. (emphasis added)

"Victim" as contemplated by Idaho Code Section 19-5306(1) is defined as: "an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime or juvenile offense" (19-5306(5)(a).

"Criminal offense" as contemplated by Idaho Code Section 19-5306(1) is defined as "any charged felony or a misdemeanor involving physical injury, or the threat of physical injury, or a sexual offense" (19-5306(5)(b)

Applying these definitions, it would not appear the provisions of Idaho Code Section 19-5306 would apply to these individuals who made statements at Appellant's sentencing. It further created a manifest injustice, since their comments were contrary to the State's recommendations.

a. The Appellant did not commit, nor did she attempt to commit any violent crime against those individuals nor was she accused of being an accomplice to the violent crime committed by McKenna prior to his death.

The crime for which appellant plead guilty and was sentence did not involve her commission or attempt to commit any violent crime against the three individuals who testified at the time of her sentencing. Nor is she charged as an accomplice to the violent crime that was committed by McKenna prior to his death. There is no question that those three individuals who testified at sentencing all suffered direct physical harm, however, that harm was a result of a commission of a crime by McKenna and not by Melanie

Lampien. Even under a civil tort theory applying the principals of proximate cause, it would be difficult to attribute liability to Melanie Lampien for the actions of McKenna and the resulting injuries to these officers. She should not have been required to reasonably foresee the criminal conduct of McKenna by brandishing a firearm and attacking the officers. Further, she had no way of stopping the officers from entering her residence, as it is clear they ultimately came into the residence without her permission or authority. (R. pg 30-32).

Counsel for appellant objected to the victim's statements on this basis, but his objection was overruled (R. pg.50).

b. The Appellant was deprived of the benefit of the State's recommendation for probation by allowing agents of the State to make recommendations to the contrary.

The primary responsibility for enforcement of criminal laws in the State of Idaho is invested in the Prosecuting Attorney and Sheriff of each of the several counties in the State. Idaho Code Section 31-2227 states in pertinent part:

> "Irrespective of police powers vested by statute in state, county, and municipal officers, it is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties. . . ."

The duties of the prosecuting attorney of each of the counties is further defined in Idaho Code Section 31-2604. It is clear from that Statute, it is the duty of the Prosecuting Attorney for Bannock County to make a decision whether to prosecute the charges brought against the appellant, Melanie Lampien. It is further the duty of the Prosecuting Attorney of Bannock County in the exercise of its discretion to determine what charges to be brought and what sentencing recommendations should be made in the resolution of the

case. There is no other law enforcement agency within Bannock County, State of Idaho with the Authority to override that decision making authority of the Bannock County Prosecuting Attorney.

In the exercise of those duties conferred upon the Prosecuting Attorney, in making charging decisions and prosecuting crimes within that jurisdiction, they would act in a supervisory position over all law enforcement agencies involved in the prosecution of that crime. Therefore, it is an agency relationship between the Bannock County Prosecuting Attorney's Office and the Law Enforcement Agencies involved in the prosecution of this case against Melanie Lampien.

The State, on one hand, entered into a Rule 11 (d)(1)(c) Plea Agreement in which a recommendation of probation and withheld judgment was to be made to the Court at the time of sentencing. The Bannock County Deputy Prosecuting Attorney appeared at sentencing, and at that time did in fact make a recommendation to the Court consistent with that Plea Agreement. However, law enforcement officers were presented to the Court and allowed to testify contrary to that recommendation.

Whether such an agency relationship exists between the County Prosecuting Attorney and law enforcement, and further whether that agency relationship is trumped by the Victim's Rights Constitutional Amendment would appear to be a matter of first impression before this Court.

Idaho Code Section 19-5306(1)(e) quoted herein above does provide the rights of the victim of a criminal offence to appear and be heard at sentencing "unless manifest injustice would result." It would seem that for appellant, Melanie Lampien's, guilty plea to be considered knowingly, intelligently, and voluntarily entered, that at the minimum

she be advised that representatives of law enforcement as well as the Idaho Department of Probation and Parole intend to appear at sentencing and argue against probation. Without being so advised, the appellant did not knowingly and intelligently enter into this agreement and ultimately was deprived of the benefit of that bargain by the conflicting recommendations being made to the Court.

This dilemma was further high-lighted by the State's comments at the time of hearing on Appellant's Rule 35 Motion to Reconsider her Sentence. The State took the position that they were no longer bound by that plea agreement and opposed the appellant's Rule 35 Motion for the Court to Reconsider and place her on probation as was the State's original recommendation. The State at that time also represented to the Court that they were there representing the Department of Probation and Parole and on their behalf asked the Court to deny appellant's Rule 35 Motion. The argument to the Court was as follows:

> "We believe that this Court heard all the facts and circumstances upon which to make its decision and exercise its discretion. We believe that this Court appropriately exercised its discretion and sentencing, and so on that basis, we would object to the Rule 35—the granting of the Rule 35.
>
> Additionally, your honor, we are also here representing the Department of Probation and Parole, and they have asked us on their behalf to object to the Rule 35 as well for the obvious reasons" (R. pg. 17 Rule 35 Motion to Reconsider).

Appellant should be granted relief. Her sentence should be vacated, and she be allowed to withdraw her plea of guilty. This would allow her the opportunity to be fully apprised of all the facts and potential consequences of her plea of guilty and sentencing before entering into further agreements.

CONCLUSION

Appellant ask this Court to allow her the opportunity to address the validity of the charges against her for the first time on this appeal. The charge of Harboring a Felon has a prerequisite that a felony has been committed by a third-party. The defendant, thereafter, must have taken action to protect that person from prosecution or conceal their whereabouts. There was no new crime alleged in the Prosecuting Attorney's Information, and therefore a crucial element or condition precedent to that charge was lacking.

Further, appellant asks this Court to review the severity of her sentence, she had no prior record and is being held accountable for the violent criminal conduct of her husband Nicholas Verl McKenna. The District Court had to be influenced by the victim statements of the wounded officers. Appellant was not fully informed, at the time she plead guilty that law enforcement would be making a recommendation at sentencing contrary to the State's plea agreement.

By allowing the wounded officers to present victim statements, she was again being held responsible for the violent criminal conduct of Nicholas Verl McKenna.

Respectfully Submitted by:

STEVAN H. THOMPSON, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 11 day of February, 2008, I served a true and correct copy of the following-described document on the parties listed below, by mailing, with the correct postage thereon, faxed, or by causing the same to be hand delivered.

DOCUMENT SERVED: **BRIEF OF APPELLANT**

PARTIES SERVED:

☒ Mailed ☐ Hand Delivered ☐ Faxed

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